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IN THE

Supreme Court of the United States

October Term, 1959

No. 437

JAMES PECK, *et al.*,
Appellants,

v.

NEW YORK,
Appellee.

ABRAHAM J. MUSTE, *et al.*,
Appellants,

v.

NEW YORK,
Appellee.

On Appeal from the Court of Appeals
of the State of New York

RESPONSE BY NEW YORK, PURSUANT TO THE COURT'S DIRECTION, AS TO THE DISCRIMINATION ISSUE RAISED IN APPELLANTS' JURISDICTIONAL STATEMENT

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Statement

In each case, appellants appeal from the final order and judgment of the Court of Appeals of the State of New York entered on December 30, 1959, affirming (4-3) the

order and judgment of the Appellate Part of the Court of Special Sessions of the City of New York, First Department, entered May 29, 1958, affirming, without opinion a judgment of the Magistrates' Court rendered December 22, 1955, in the *Muste* case and January 17, 1957, in the *Peck* case, convicting the appellants, after trial, of the misdemeanor of WILFUL DISOBEDIENCE OF AN OFFICIAL ORDER [New York State Defense Emergency Act, §101, subd. 2(b)]. The appellants in the *Muste* case received suspended sentences (Proceedings of Dec. 22, 1955, p. 13) and the appellants in the *Peck* case received sentences of a fine of $25, or in the alternative, 5 days in prison (f. 820).*

THE EVIDENCE

The facts in the Muste Case

Participating in a national civil defense test exercise known as "Operation Alert 1955", pursuant to standards and directives promulgated by the New York State Civil Defense Commission, with the objective, among others, of increasing public knowledge and training in civil defense survival techniques (Peo. Exh. 1., p. 1 of standards), the New York City Office of Civil Defense issued a directive to the city's civil defense agencies (Peo. Exh. 1, pp. 9-12). It contained elaborate instructions regarding persons at home, in vehicles and on the streets, and, as to the latter, declared that non-civil defense persons were to "seek shelter immediately upon the sounding of the Apple Jack [alerting siren] signal" (ibid, p. 12). The city's Force was advised, "Full cooperation is expected from the general public * * * every person except members of the Force shall seek shelter in the same manner as if an actual air

* References preceded by the symbol "p." are to pages of the typewritten record of the Muste case. References preceded by the symbol "f." are to folios of the printed record in the Peck case.

raid had occurred?" (Exh. 3, p. 8, j). The appellants (except Maclow), members of various pacifist organizations, admittedly went to City Hall Park pursuant to a preconceived organized plan (Def. Exh. G) not to participate or take shelter if ordered to do so (pp. 100, 102, 103-4, 107-8, 112, 113, 114, 138-9, 164-5), and seated themselves on benches (pp. 16, 24, 28). Ordered by Auxiliary Police Colonel Hearn, after the alert had sounded, to go to bomb-proof shelters provided by the City, one being in City Hall and the others being across the street (24-5, 35-6), and although one of them testified that he had a petition with him for presentation to the Mayor, appellants admittedly remained seated and deliberately refused to comply (pp. 112-6, 141, 172). Thereupon, they were arrested for refusing to obey the official order thus given to take shelter. Maclow, who was also arrested for refusing to obey the order, had been parading around the periphery of the park with a sign against A and H Bomb explosions (pp. 195-200).

The defense elicited from Colonel Hearn that to his knowledge no clergymen or members of a religious order were exempt from the drill (56). None of the defendants told the officer that they were clergymen or that they had permission to be exempt (56).

The directives provided that in outlying sections, "where no adequate shelter is available", passengers could remain in busses; subways were to be allowed to operate; overhead, trains were to be permitted to continue to nearest station and passengers allowed to remain within; interstate and intrastate trains entering or leaving the city, and ferries and other watercraft were permitted to operate; airplanes were permitted to land, and those on the ground were to remain so (Exh. 3, Directive, p. 8, at G, H and I); and drivers of newspaper trucks making deliveries were to be allowed to continue (Exh. 2).

The facts in the Peck case

The standards for a civil defense exercise in New York State, promulgated by the New York State Civil Defense Commission as part of a national civil defense test known as "Operation Alert 1956," and the purposes and requirements for public participation were, insofar as here relevant, identical with those in the *Muste* case (ff. 840-90), with the addition that, for the purposes of this particular drill, people at beaches and amusement parks should seek the best available shelter, and people at race tracks and ball parks should remain in their seats and obey the management's instructions (Peo. Exh. 2, ff. 851-2; cf., Exh. 3, "33" at f. 949).

The appellants, admittedly because they disagreed with the civil defense policy of this country as restrictive, ineffectual, morally or spiritually wrong, or for all those reasons, went to Washington Square Park in accordance with a preconceived plan to test the constitutionality of the law (ff. 593-608; 615, 617, 655, 682, 683-4, 691, 708, 776). They had previously notified the police that they would be at the northwest corner of the park, and both the police and TV men were there "because they know we go where we say we go" (ff. 617-19). As their leader testified, "Anyone that came in for participation in this immediately sat down on the bench" (ff. 545-6). They refused to move and take available shelter during the alert, notwithstanding Deputy Chief Hearn's orders to do so, whereupon he arrested them for disobeying his orders (ff. 327, 337-9, 342-5, 371-2, 550). Various appellants spoke with some newspaper, radio and television men, who were around (ff. 547-8, 552). Gilmore, appellants' leader, admitted having no doubt in his mind that "we were required to take shelter during this drill * * * I knew we had to" (612).

No Substantial Federal Question is Presented by the Claim of Discrimination

The appellants claim unconstitutional discrimination [pp. 31-3 (g) and (h)] in that there is no reasonable basis for requiring them to take shelter, whereas (1) the regulations did not require persons at ball parks, race tracks, bathing beaches, and in certain public conveyances, to seek shelter; (2) news photographers, reporters and television crews were not required to seek shelter; (3) many citizens of Washington, D. C. and Peoria, Ill., ignored the exercise, although it was of national scope, and were not arrested; (4) the State Defense Emergency Act contained provisions supposedly exempting a member of a religious order who engaged in duties for a church or religious organization (citing §100, subd. 1; §101, subd. 6). In addition [pp. 33-5, (i)], they claim discrimination because the legislature (which was held, below, to have been duly authorized by the state constitution) required that all misdemeanors under the Act be tried in the N. Y. City Magistrates' Court, whereas it had given primary misdemeanor jurisdiction in other cases to the Court of Special Sessions.

These claims present no substantial federal question, for the reasons set forth below in considering the claims *seriatim*. We note here, generally, that there has been no showing of "invidious discrimination" in the statute [*Morey* v. *Dowd* (1956) 354 U. S. 457, 463, quoting *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 489]. The Constitution does not require situations different in fact to be treated the same [*Goesart* v. *Cleary* (1948) 335 U. S. 464, 466]. Nor, indeed, is there any "requirement of equal protection that all evils of the same genus be eradicated or none at all" [*Railway Express* v. *New York* (1949) 336

U. S. 106, 110]. Particularly is this so, as will be seen, as to the practical defense emergency situations with which the formulators of the directives herein were confronted in the particular experimental test drills they devised. To the extent that some pedestrians may have escaped participation in a test program so vast and understaffed, dependent as it was, for proper enforcement, upon volunteers, we need only note that failure by the authorities to achieve a 100% enforcement of the law is hardly a defense to a criminal prosecution. Lastly, as will be seen, the appellants had no federally-protected right to have their instant misdemeanor tried in a court other than the duly constituted court to which the legislature, in the statute, gave jurisdiction pursuant (as was held by the New York Court of Appeals) to authority vested in the legislature by the state constitution.

As we show here seriatim, there is no substance to claims (1), (2) and (3), supra.

(1) The appellants, in making claims addressed to the exemption, by the authorities, of people at ball parks, race tracks, beaches, etc., from the requirements to take shelter, ignore the basic functions of a civil defense alert *test* exercise. Among others, they enable the authorities to determine, from observing the drill-in-action as projected for the particular occasion whether the public responds in a manner conforming to notices, and whether changes or variations should be tried or made in any phase of a future test. Basically, the function of a drill is to train wardens and the general population to act during the drill *as if there were* an attack. "[U]nless people are so 'shelter conscious' that they will go *automatically* to a shelter area on an Alert, all your teaching may be in vain" (Warden's Manual [Thomas E. Dewey, Governor] p. 93). On the other hand, the authorities, faced with the practicalities of the situation, either because other shelter was not avail-

able to occupants of buses in outlying areas or to the masses of people sitting in the stands at ball games and race tracks, directed that such persons sit where they were during the practice alert, while persons at amusement parks and beaches were expected to find the best available shelter. In addition, "One air raid warden is needed for every 75 people in a target city" (Governor Dewey's special message to legislature recommending enactment of the instant law, Jan. 8, 1951). On this basis, it was highly reasonable to require that the vast crowds, who had nowhere to go for shelter, sit where they were; rather than to attempt to handle such an unwieldy mass, with its potential for panic unless adequately directed; and to train them to remain seated under such circumstances, obeying the management's orders, to avoid panic. Moreover, we note that the rules applicable to ball games, race tracks, beaches and amusement parks were added for the purposes of the 1956 drill, and accordingly they provided a means for observing how the public would react in the places indicated. Beyond this, the authorities could certainly determine, as part of a given drill, that certain types of transportation facilities should keep rolling. Those situations were certainly not the same as that of the appellants in City Hall Park and Washington Square Park, since shelters were available, and they were ordered to take shelter by an available warden. Of course, the warden's attention to appellants' recalcitrance precluded, to that extent, his attending to his duties with regard to other persons.

(2) As far as news reporters are concerned, we know of no time or place of danger in the history of this nation, when that class of persons has not been allowed relative freedom of access to danger zones. Although nothing was spelled out in writing in the directives, we note that the presence of the newsmen conformed to one of the purposes and duties of the Commission, namely, to provide "Programs for the training and *information* of the public, including but not limited to practice blackouts, drills or tests"

(§21, subd. i), and the concomitant duty of the city authorities, among other things to "Conduct tests and drills necessary to train civil defense forces and *inform the public*" (§23, subd. 19).

(3) Whatever situation may have existed in Washington, D. C. and Peoria, Ill. (the facts do not appear in the record of this case) has no application here. The instant violation was of a New York State statute, for failure to obey a New York City air raid warden's order made pursuant to local directives issued under state law.

(4) A. *The purported exemption to members of a religious order is not unreasonable and does not discriminate against this defendant.*

The appellants claim that the statute discriminates against them in that there is no reasonable basis for failure to include them in the exemption alleged to be granted in the New York State Defense Emergency Act to members of a "religious order" while engaged in "duties for" a "recognized church" or "religious organization" [§§100(1), 101(6)]. We never have and do not here contend that the appellants' churches or religious orders would not be entitled to be considered "recognized" under the definition of "exempt persons" (§100, subd. 1). Their claim, therefore (assuming that the definition as to exempt persons, here involved, was operative at all in favor of anybody, as to which see, *contra*, (4)B hereof, *infra*), depends, basically, on whether the appellants were engaged in "duties for" a church or religious organization within the meaning of that clause. In this regard, we never have and do not here contend for a limitation of "duties" to those that are popularly considered orthodox. It is clear, however, that whatever duties were within the legislative intendment must be religious ones and that the appellants, by using the occasion of the alert to publicize their opposition to civil defense, were engaging in

an activity basically political rather than religous. Beyond this, however, the appellants' claim of discrimination is that the definition (§100, subd. 1) unreasonably excluded them from engaging in a particular category of religious activity while exempting others in the same category. There is no basis for this claim, which is specious. They argue that what they were doing when sitting in the park was just as much a "religious practice or activity or in fulfillment of a duty" "as though they were attending a church service and singing hymns" (Statement as to Jurisdiction, p. 32). Obviously, however, the definition was not intended to exempt those attending a church service in a park during an air raid alert from obeying an official order to go to an available shelter, nor has the appellant shown that it was intended to do so. If the latter are not exempt, the appellants who claim equal treatment with them, cannot claim to be discriminated against. The very purpose of the statute was to enforce training that would make the taking of shelter, by civilians, second nature, so that it would be done automatically in an attack. It was intended that they learn to act and react *as if* it were the "real thing", just as the statute is applicable to the "real thing" also. Thus, it was clearly intended to apply to a category of religious activity altogether removed from that into which the appellants seek to fit themselves. Religious worship, to which the appellants assimilate their activity, involves the exercise of a "right", and, when sought to be exercised in a public park is necessarily subject to reasonable regulation as to time and place. The legislature, however, advisedly limited the potential exemption to "duties", thereby conveying, in the emergency setting of the statute, the not unreasonable concept of permitting an urgent religious ministration which could not wait;—which could not be postponed to a later time or another place. Indeed, the definition speaks of a "clergyman or member of a religious order" while engaged in duties "for" a church or religious organization.

In its setting, therefore, the exemption contemplated by the definition is intended for an *administrator* of religious rites, while engaged in emergency ministrations, imposed upon him as a duty to communicants by the tenets of his faith—and not themselves designed to subvert the law—such as extreme unction, baptism and confession, that cannot be postponed until the "all clear". Such a category of activities, reminiscent of ministrations daily performed under conditions of danger in disasters and even under battle stress, on behalf of a church, for communicants whose needs cannot wait, is one which, in this frame of reference, is seen to provide a classification that is not unreasonable for legislative or administrative exemption during civil defense activities. By the same token, as seen, it is in a wholly different category of activity from that in which the defendants were engaged.

(4) B. *Actually, it is crystal clear that the sections relied on do not ipso facto grant anybody an exemption while engaged in religious duties.*

In point of fact, although the arguments below assumed that the statute (§100, subd. 1; §101, subd. 6) *grants* to certain persons engaged in emergency religious duties exemption from taking shelter, a careful reading of the statute makes the following very clear: [1] Subdivision 1 of §100 merely sets forth a *definition* of "exempt persons". [2] Subdivisions 1-5 of §101 prescribe penalties for stated violations of Defense Council and Civil Defense regulations and orders, including failure to obey an order given on the scene by an authorized person. These involve both preparation against, and actual defense from, enemy attack. [3] Subdivision 6 of §101 makes it crystal clear, however, that *no person is exempted* from the provisions of §101, subdivisions 1-5, by virtue of the definition of "exempt person," *except* to the extent that a "regulation or order of the

council [State Defense Council] or commission [State Civil Defense Commission]" may so prescribe. This section (§101, subd. 6) reads as follows:

> "6. The provisions of this section shall not apply to exempt persons *to the extent prescribed by regulation or order of the council or commission.*"

The legislature, in thus entrusting to the State Defense Council and the State Civil Defense Commission the permissive discretion of whether, and the extent to which, it would activate the defined exemptions, wrote wisely indeed. The legislature in 1950 could not foresee to what extent clergymen or others engaged in religious duties could or should be exempted from the stated provisions (§101, subds. 1-5, *supra*), under the conditions of actual atomic attack or the requirements of particular drills, since those sections apply to both real and hypothetical raids. Indeed, had it given any such exemption as that for which the appellants contend, it would have meant that a clergyman *qua* clergyman, while engaged in his religious duties, would be automatically exempt, for instance, from obeying a *black-out* regulation or order, concerning "the effective screening or extinguishment of all lights, lighting devices and appliances" [§101, subd. 2(a)]. Yet that would be one example of the effect—with appalling potential consequences in the event of an attack—if the statute itself had made the definition operative. We know of no regulation or order of the State Defense Council, and have been advised by the State Civil Defense Commission that it has issued none under the permissive discretion granted them, by which either Body has authorized *any* exemption from the provisions of §101, subdivisions 1-5, for clergymen or members of a religious order. Nor did the appellants offer any in support of their defense. Thus, Deputy Chief Hearn spoke truly when, in response to questioning by the defense on the trial, he stated that, to his knowledge, there was no exemption for clergymen or members of a religious order.

(5) *Conferral of jurisdiction on the City Magistrates' Court clearly did not deprive the appellants of due process of law or the equal protection of the laws.*

The jurisdiction conferred by the Civil Defense Act upon the city magistrates' courts of the city of New York to try all misdemeanors (as well as lesser offenses) under the Act, was sustained herein by the New York Court of Appeals, which held that the legislature was authorized to confer it by Article 6, Section 18 of the New York State Constitution. By that section, courts of special sessions "and inferior local courts of similar character" shall have such jurisdiction of offenses of the grade of misdemeanor "as may be prescribed by law". The Court held that city magistrates' courts of the city of New York were "inferior local courts of similar character." The legislature, in promulgating the emergency civil defense act, decided, pursuant to that section, to give jurisdiction over charges of misdemeanors under the act to the same inferior local court upon which it was conferring jurisdiction to try lesser offenses under the act. Clearly, it was the view of the legislature that all cases charging violations of the civil defense act could best be handled by a single magistrate rather than by the three-justice court of special sessions. Indeed, prior to the instant statute, the city magistrates' court had the power for years, albeit with the defendant's consent, to try any of a long catalogue of misdemeanor cases; the single magistrate being regarded as sitting, for the purpose, as a judge of the court of special sessions (N. Y. C. Criminal Courts Act, §130, subds. "a" through "x"). This roundabout method of using the services of a single city magistrate was "undoubtedly considered necessary" [*People* v. *Aptaker* (Ct. of Sp. Sess., App. Part, 1st Dept. 1941) 25 N. Y. Supp. 2d 950, 952, not officially reported; to same effect *People* v. *Citarelli* (1st Dept. 1936) 247 App. Div. 53, 55] by the legislature because (as the opinion below attests) the state constitution had thereto-

fore been erroneously construed as not granting the legislature authority to vest misdemeanor jurisdiction, where it saw fit to do so, as here, in the city magistrates' court as such (see *Aptaker* and *Citarelli* cases).* The legislature, having decided, by virtue of its state constitutional authority, confirmed herein, to extend the jurisdiction of city magistrates *qua* city magistrates, over *all* the cases involving Civil Defense misdemeanors, by conferring it as part of the very enactment creating those misdemeanors, it is difficult to see how the defendants can claim discrimination. "* * * [T]hat a state may make different arrangements for trials under different circumstances of even the same class of offenses has been already settled by this Court" [*Brown* v. *New Jersey* (1899) 175 U. S. 173, 177; also, *Graham* v. *West Virginia* (1911) 224 U. S. 616, 630]. The defendants cite *Duncan* v. *Kahanamoku*, 327 U. S. 304, 330-1. The *Duncan* case, in which the prevailing opinion was written by Mr. Justice Black, held only that the phrase "martial law" in the Hawaiian Organic Act was not intended to exceed the boundaries between military and civilian power, and so was not intended to authorize "the supplanting of courts by *military* tribunals" (*ibid.*, 324; emphasis supplied). The New York legislature has fully respected the distinction between military and civilian power in the instant matter, by vouchsafing jurisdiction to the local branch of the civilian criminal court system which it deemed to be best qualified to handle this type of case. The construction of the state constitutional provision (N. Y. Const. Art. 6, §18) by the Court of Appeals is, of course, the law of the case, binding on this Court. Jurisdiction having been held to have been duly conferred pursuant to that provision by the state legislature, the city magistrate's court was a competent court to try the appellants herein, and any claim averring deprivation of due process or equal protection is, in the circumstances, specious.

*Since confirmation of legislative authority by the instant case, a 1960 law has vested exclusive jurisdiction in city magistrates to try all complaints of misdemeanors under the Gambling provisions of the Penal Law (N. Y. City Crim. Cts. Act §102-a, as amended by L. 1960, ch. 466, §3).

Conclusion

The appeal should be dismissed.

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